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In the Supreme Court of the United States

OCTOBER TERM, 1979

CHICAGO TRANSIT AUTHORITY, PETITIONER

v.

NEIL E. GOLDSCHMIDT, SECRETARY OF TRANSPORTATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

ALICE DANIEL
Assistant Attorney General

ROBERT E. KOPP
BRUCE G. FORREST
Attorneys
Department of Justice
Washington, D.C. 20530

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A21) is reported at 607 F. 2d 1284. The opinion of the district court (Pet. App. A22-A32) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 29, 1979. A petition for rehearing was denied on January 10, 1980. The petition for a writ of certiorari was filed on February 22, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Urban Mass Transportation Administration correctly determined that the daily transpor-

tation of school children from school to school constitutes "school bus operations" within the meaning of the Urban Mass Transportation Act of 1964, 49 U.S.C. 1602(g) and 1602a(b).

2. Whether the Urban Mass Transportation Administration correctly determined that petitioner could not conduct school bus operations under the "grandfather clause" in 49 U.S.C. 1602(g) and in 49 U.S.C. 1602a(b), while using federally-subsidized buses.

STATEMENT

1. The Urban Mass Transportation Act of 1964, 49 U.S.C. 1601 *et seq.* (the Act), authorizes the Secretary of Transportation to make grants or loans to assist states and local public bodies in the acquisition or construction of facilities and equipment for use in "mass transportation." 49 U.S.C. 1602(a)(1). The term "mass transportation" is defined in 49 U.S.C. 1608(c)(5) as "transportation by bus, rail, or other conveyance, either publicly or privately owned, which provides to the public general or special service (*but not including school buses* or charter or sightseeing service) on a regular and continuing basis" (emphasis added).

49 U.S.C. 1602(g) precludes the Secretary from disbursing any monies under the Act unless the applicant for such funds agrees that it "will not engage in school bus operations, exclusively for the transportation of students and school personnel, in competition with private schoolbus operators." A similar provision is found in 49 U.S.C. 1602a(b).[1]

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[1]Although now codified in 49 U.S.C. 1602a(b) as part of the Act, this provision was originally enacted as Section 164(b) of the Federal-Aid Highway Act of 1973, Pub. L. No. 93-87, 87 Stat. 281-282.

Under regulations promulgated by the Urban Mass Transportation Administration (UMTA), the term "school bus operations" is defined as "transportation by bus exclusively for school students, personnel and equipment in Type I and Type II school vehicles as defined in Highway Safety Program Standard No. 17." 49 C.F.R. 605.3(b). The referenced Safety Standard No. 17 of the National Highway Transportation Safety Administration (NHTSA) refers to school vehicles, with certain exceptions not here relevant, as motor vehicles "used to carry more than 16 pupils to and from school" (Type I) and motor vehicles "used to carry 16 or less pupils to or from school" (Type II). 23 C.F.R. 1204.4-III.

Grant applicants under the Act must agree not to engage in school bus operations. 49 C.F.R. 605.15. If the grantee desires to undertake activities that it believes fall within exemptions from such prohibitions (49 C.F.R. 605.11), it must notify "all private school bus operators operating in the urban area" (49 C.F.R. 605.16). The UMTA may then approve these activities after review of any comments received by the private bus companies (49 C.F.R. 605.18-605.19). Additionally, an "interested party" may file a complaint with the UMTA alleging a violation of the grantee's agreement not to engage in school bus operations. If the UMTA finds that a violation has occurred, it may order appropriate remedial measures, including the possible withdrawal of further financial assistance (49 C.F.R. 605.30-605.34). The final determination of the UMTA is subject to judicial review (49 C.F.R. 605.35).

2. In December 1974, the Chicago Board of Education solicited bids for the transportation of school pupils from one school to another in the morning and their return at

the end of the school day.[2] Petitioner successfully underbid all private competitors with its fleet of buses purchased with an 80% subsidy under the Act (Pet. App. A3). In April 1977, Bradford School Transit, Inc., a private school bus operator and an unsuccessful bidder for the Chicago Board of Education contract, filed an administrative complaint with the UMTA alleging that petitioner's performance of the school board contract violated its grant agreement not to engage in school bus operations (*id.* at A4-A5).

On April 25, 1978, the UMTA ruled that the services provided under the Chicago Board of Education contract were school bus operations prohibited under the Act (Pet. App. A33-A42). The UMTA reviewed the statute and its legislative history, which showed that Congress intended to permit "'individual charter-type trips'" as incidental charter service, but not "the recurring, everyday use of buses exclusively for school operations" (*id.* at A40).[3] The UMTA ruled that some of the disputed operations could be continued in the future pursuant to the "grandfather clause" in 49 U.S.C. 1602a(b), because petitioner had engaged in such operations in 1972-1973, but that the operations could not be carried out using equipment funded by the Act (Pet. App. A41). Petitioner was permitted, however, to complete its current contract using such equipment in order to avoid undue hardship (*id.* at A42).

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[2]The services involved are set forth in the opinion of the district court at Pet. App. A24.

[3]The UMTA acknowledged (Pet. App. A42) that it was overruling a previous decision concerning petitioner's operations (*A&D Davenport Transportation, et al.* v. *Chicago Transit Authority* (May 5, 1977) (Pet. App. A43-A49)). In that decision, the UMTA had concluded that school-to-school service was distinguishable from the more familiar home-to-school service for purposes of the prohibition against school bus operations.

Petitioner sought review of the UMTA's decision in the United States District Court for the Northern District of Illinois. That court, concluding that the agency had misconstrued its own regulations, set aside the decision and remanded for a finding whether another provision in the regulations not considered by the agency might preclude petitioner's use of UMTA-funded equipment for the disputed operations (Pet. App. A22-A32).

The court of appeals reversed (Pet. App. A1-A21). The court found that the UMTA properly barred petitioner from using federally-funded equipment for the regular transportation of students from school to school because such transportation constitutes "school bus operations" within the meaning of 49 U.S.C. 1602a(b) and 1602(g) and the applicable agency regulations. In particular, the court construed the phrase "to and from school," as used in Safety Standard 17 and incorporated by reference in the agency regulation defining school bus operations (49 C.F.R. 605.3(b)), to include school-to-school services like those offered by petitioner (Pet. App. A9-A10). The court found this construction more consistent with the purpose for which the Safety Standard was written (*id.* at A9-A13).

The court also rejected petitioner's argument that the disputed services were permissible under agency regulations exempting "charter bus operations." The court observed that petitioner's bus services are regularly scheduled and that to permit them to proceed as charter operations would be contrary to the intent of Congress to minimize competition between grantees and private school bus operators (Pet. App. A13-A16). Finally, the court sustained the UMTA's interpretation of the Act's grandfather clause—an interpretation embodied in agency regulations—as permitting grantees such as petitioner to continue historic school bus operations only where federally-subsidized buses are not used (*id.* at A16-A21).

ARGUMENT

The decision of the court of appeals involves limited questions concerning the interpretation of two similar statutory provisions and implementing regulations.[4] The decision is correct, does not conflict with any decisions of this Court or of another court of appeals, and does not warrant further review.

1. The UMTA's construction of the Urban Mass Transportation Act and of its own implementing regulations is entitled to deference where, as here, that construction is reasonably related to the statutory purpose. See, *e.g.*, *Mourning* v. *Family Publications Service, Inc.*, 411 U.S. 356, 369 (1973); *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1969). The court of appeals correctly concluded that the UMTA had properly read its own regulations as barring petitioner from using federally-subsidized buses in school-to-school transportation and that such a result is consistent with the language and legislative history of the Act.

As petitioner demonstrates (Pet. 11-13), it is possible, under a literal reading of certain provisions referring to incidental charter bus operations, to construe the regulations as permitting a grantee to provide regular school-to-school transportation for students. But, as the court of appeals correctly observed, the UMTA's contrary reading of the regulations defining "charter bus

[4]Petitioner offers no support for its assertion (Pet. 10) that the decision of the court of appeals will result in a loss to public transit authorities of "hundreds of millions of dollars" and will jeopardize school desegregation programs.

operations" and "school bus operations" is at least equally plausible (Pet. App. A14-A15; footnotes omitted):

> Since the transportation here is daily service to and from school at the beginning and end of the school day, it is indistinguishable from undisputed school bus operations except for the common point of pick-up and delivery. Although that distinction permits the services to fit technically within the "charter bus operation" language, we believe that the language of the charter regulation describes a single trip or series of trips for school students rather than daily transportation at the beginning and end of each school day when it speaks of groups traveling under a "single contract" and "under an itinerary, either agreed on in advance or modified after having left the place of origin." The school bus operations regulation, on the other hand, speaks of transportation "to and from school," language which we have concluded describes the daily transportation of students to and from their schools of regular attendance at the beginning and end of the school day. Therefore these services better fit the ordinary meaning of the language of the school bus operations regulation.

Moreover, as the court of appeals noted (Pet. App. A10-A12, A15-A16), this construction of the UMTA's regulations is more consistent with (1) the apparent purpose of Safety Standard No. 17, the language of which is incorporated by reference in the definition of "school bus operations" in 49 C.F.R. 605.3(b), and (2) the intent of Congress in enacting 49 U.S.C. 1602(g) and 1602a(b). First, were petitioner's operations considered outside the definition of "school bus operations" in 49 C.F.R. 605.3(b), they might well escape appropriate safety requirements promulgated by the National Highway Traffic Safety Administration for the safe transportation

of schoolchildren (see Pet. App. A10-A12).[5] Second, petitioner's construction of the regulations is inconsistent with the intent of Congress to place strict limitations on competition between grant recipients and unsubsidized private school bus operators. Although, as petitioner points out (Pet. 13), one proposed limitation—prohibiting grantees from transporting students to "school-authorized functions" (see 119 Cong. Rec. 13266 (1973))—was rejected by Congress when it enacted the provision now codified at 49 U.S.C. 1602a(b), the language finally agreed upon was designed only to permit subsidized buses to "be used on individual charter-type trips to transport schoolchildren to various points of interest * * *." 119 Cong. Rec. 28102 (1973) (remarks of Rep. Kluczynski). The services at issue here obviously do not fall into that category.[6]

2. Petitioner alternatively challenges (Pet. 13-16) the UMTA's regulations that permit petitioner's "grandfathered" school bus operations to continue only with equipment not funded by the UMTA. This contention,

[5]Perhaps in recognition of this result, petitioner appears to have abandoned any reliance on the district court's conclusion (Pet. App. A29) that the UMTA's reading of 49 C.F.R. 605.3(b) is inconsistent with the purpose for which Safety Standard No. 17 was promulgated.

[6]The UMTA's decision cannot be faulted for having overruled a single earlier decision that interpreted the regulations differently (see page 4, note 3, *supra*). An agency "is not disqualified from changing its mind; and when it does, the courts still sit in review of the administrative decision and should not approach the statutory construction issue *de novo* and without regard to the administrative understanding of the statutes." *NLRB* v. *Local Union No. 103, Iron Workers*, 434 U.S. 335, 351 (1978).

however, ignores the plain language of the grandfather clauses of 49 U.S.C. 1602(g) and 49 U.S.C. 1602a(b), which provide that the bar to a grantee's engaging in school bus operations in competition with private school bus operators

> shall not apply with respect to any *State or local public body or agency thereof* if it (or a direct predecessor in interest from which it acquired the function of so transporting school children and personnel along with facilities to be used therefor) was so engaged in school bus operations any time during the twelve-month period immediately prior to [the date of the enactment of the subsection]. [Emphasis supplied.]

The language plainly exempts only the grantee agency meeting this criterion; it does not sanction use of the grantee's federally-subsidized equipment.

Petitioner also attacks (Pet. 14-15) the dictum in the court of appeals' opinion that "[f]ederally-funded buses would be exempted only where they have been acquired from a direct predecessor in interest who engaged in school bus operations during the grandfather period" (Pet. App. A18). As petitioner notes (Pet. 14), this would produce the result that an agency acquiring federally-funded buses from a grantee that had engaged in school bus operations during the grandfather period would be permitted to use the equipment in such operations in competition with private bus companies even though a grantee that itself met the grandfather requirement would not be permitted to engage in such operations using its own federally-subsidized equipment. The court's view on this issue, however, is not essential to the basic proposition that the grandfather clause does not permit grantees such as petitioner to use federally-funded equipment in school bus operations in competition with

private school bus companies. Moreover, it does not reflect the policy of the UMTA, whose regulations nowhere suggest such an exemption for federally-subsidized equipment. The parenthetical phrase in the grandfather clause containing the reference to "facilities" merely allows a grantee agency that acquires transportation equipment and facilities from an entity that has engaged in school bus operations during the grandfather period to continue such operations, so long as it does not use federally-subsidized buses.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

ALICE DANIEL
Assistant Attorney General

ROBERT E. KOPP
BRUCE G. FORREST
Attorneys

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